Supreme Court, U.S.
FILED
JAN 3 1983
ALEXANDER L. STEVAS
CLERK

No. 81-2159

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

BILL M. SILKWOOD, Administrator of the Estate of
KAREN G. SILKWOOD, Deceased,
Appellant,

versus

THE KERR-McGEE CORPORATION,
a Delaware Corporation, and
THE KERR-McGEE NUCLEAR CORPORATION,
a Delaware Corporation,
Appellees.

On Appeal from the United States Court of
Appeals for the Tenth Circuit

# APPELLANT'S BRIEF IN RESPONSE TO BRIEF OF SOLICITOR GENERAL AND IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

## TABLE OF CONTENTS


| | Page(s) |
|---|---|
| INTRODUCTION..... | 2 |
| A. The issue of the constitutionality of Oklahoma's punitive damages statute was presented to the court of appeals..... | 3 |
| B The constitutionality of Oklahoma's punitive damage statute was considered by the court of appeals..... | 4 |
| C. Oklahoma did not "finesse" the requirements of 20 USC §1284(2) in making a statutory declaration of the common law.... | 5 |
| D. No statutory or factual grounds exist so as to render deciding the constitutional issues unnecessary by either the court of appeals or this Court..... | 6 |
| I. An award of damages remained after the court of appeals decision adequate to support substantial punitive damages... | 7 |
| II. The Appellees' liability for the personal injuries suffered by Karen Silkwood has not been finally resolved... . | 8 |
| III. The Appellees were not in compliance with applicable NRC regulations, and even if they were, such compliance would not bar the award of punitive damages... | 9 |

TABLE OF CONTENTS CONTINUED


| | Page(s) |
|---|---|
| E. No such comprehensive regulation of the Appellees' activities existed so as to justify preemption by occupation of the field by the federal government..... | 10 |
| F. The abrogation of a pre-existing state statutory tort remedy without a reasonably just substitute violates the due process and equal protection clauses of the United States Constitution..... | 12 |
| THE COURT SHOULD ACCEPT THIS CASE FOR REVIEW. | |
| A. Since punitive damages are recoverable under the Price-Anderson Act, it was manifest error for the court of appeals to preempt a state punitive damages on the basis that they would conflict with the federal legislative scheme..... | 14 |
| B. Even if punitive damages are not available under the Price-Anderson Act, Congress has expressed its intention that, without limitation, state tort law should apply to a case such as this.... | 15 |
| THE COURT SHOULD NOT DEFER CONSIDERATION OF THE ISSUES RAISED BY THIS CASE..... | 18 |
| CONCLUSION..... | 20 |

TABLE OF CONTENTS CONTINUED Page(s)

TABLE OF AUTHORITIES

Cases


Barnes v. McKinney,
589 P.2d 698 (OK. App.1978)..... 4

Blum v. Bacon,
___U.S.___, 102 S.Ct. 2355 (1981)..... 6

Duke Power v. Carolina Environmental Study Group,
438 U.S. 59 (1978)..... 5,12,13

Elkington v. Foust,
618 P.2d 37 (Utah 1980)..... 18

Garland Coal v. Few,
267 F.2d 785 (10th CIR 1959)..... 6

Gilbreath v. Phillips Petroleum Co.,
526 F.Supp. 657 (W.D. OK. 1980)..... 4

Gulf Oil Co. v. Bernard,
452 U.S. 89 (1981)..... 6

Hull v. Wolfe,
393 p.2d 491 (OK. 1964)..... 8,9

Kansas O&G Ry. Co. v. Clark,
262 P.2d 426 (OK. 1903)..... 10

Lindquist v. Ayerst Laboratories, Inc.,
607 P.2d 1339 (Kan. 1980)..... 18

McBroom v. Mayer,
303 P.2d 303 (OK. 1956)..... 10

Nader v. Allegheny Airlines,
426 U.S. 290 (1976)..... 3,5,6

TABLE OF CONTENTS CONTINUED


| | Page(s) |
|---|---|
| Nixon v. Oklahoma City, 555 P.2d 1283 (OK. 1976) | 4 |
| Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th CIR 1971), affd. mem. 405 U.S. 1035 (1972) | 3,6,10 |
| Sears v. Summit, Inc., 616 P.2d 765 (WY. 1980) | 18 |
| Silkwood v. Kerr-McGee Corp., 485 F.Supp. 566 (1979) | 8,9 |
| State ex rel Pollution, etc. v. Kerr-McGee, Corporation, 619 P.2d 858 (OK. 1980) | 6 |
| Timmons v. Royal Globe Ins. Co., 53 O.B.A.S. 1898 (OK. August 7, 1982) | 8 |
| Transport Indemnity Company v. Page, 406 P.2d 980 (OK. 1965) | 10 |
| Wirth v. Commercial Resources, Inc., 630 P.2d 292 (N.M. App.1981) | 18 |


STATUTES


| | |
|---|---|
| 28 U.S.C. §1254(2) | 2,5 |
| 28 U.S.C. §2103 | 2 |
| C.R.S. 73, 13-21-102 | 18 |
| 23 O.S. §9 | Passim |
| St. 1890 §2619 | 5 |
| W.S.A. 1977 §12-5-502 | 18 |
| 10 C.F.R. §20.105(b) | 12 |
| 10 C.F.R. §20.1061(a) | 12 |

TABLE OF CONTENTS CONTINUED

Page(s)

LEGISLATIVE MATERIALS

Selected Materials on Atomic Energy Indemnity and Insurance Legislation, Joint Committee on Atomic Energy (1965)..... 14
Selected Materials on Federal-State Cooperation in the Atomic Energy Field, Joint Committee on Atomic Energy (1959)..... 15
H.Rep. 296, 85th Cong., 1st Sess. (1957)..... 15
S.Rep. No. 296, 1957 U.S. Code, Cong. & Adm. News 1803 (1957)..... 15
S.Rep. No. 1605, 1966 U.S. Code, Cong. & Adm. News 3201 (1966)..... 15,17
H.Rep. 698, 94th Cong., 1st Sess. (1975)..... 17

OTHER AUTHORITIES

Cuff & Young, The United States Energy Atlas, Free Press, New York, 1980..... 19
Loftness, Energy Handbook, Van Nostrand, New York 1978..... 18,19
U.S. Department of Energy, Inventory of Power Plants in the United States, 1980 Annual..... 19

No. 81-2159

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

BILL M. SILKWOOD, Administrator of the Estate of KAREN G. SILKWOOD, Deceased,
Appellant,

versus

THE KERR-McGEE CORPORATION,
a Delaware Corporation, and
THE KERR-McGEE NUCLEAR CORPORATION,
a Delaware Corporation,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

# APPELLANT'S BRIEF IN RESPONSE TO BRIEF OF SOLICITOR GENERAL AND IN OPPOSITION TO APPELLEES' MOTION TO DISMISS OR AFFIRM

Bill M. Silkwood, as administrator of the Estate of Karen G. Silkwood, deceased, submits the following in response to the Brief filed by the Solicitor

General of the United States. To the extent that the Solicitor General has adopted or advanced arguments similar to those of the Appellees, this brief also constitutes a Brief in Opposition to the Appellees' Motion to Dismiss or Affirm.

The Solicitor General argues that this case is not appealable because the Tenth Circuit did not specifically discuss Oklahoma's statute and because the Circuit could have overturned the jury's punitive award on other, non-preemption grounds.

These arguments are specious. Appellant's right to a direct appeal is determined by what the Circuit did rule - not what it could have ruled. What it did was to ignore the proper preemption standards and to preempt a pre-existing statutory tort remedy despite Congress' expressed intention that state tort law is to control.

Thirteen states have joined as amici with appellant in asking this Court to take jurisdiction over this case and to overturn the Circuit's unwarranted, incorrect and unjust decision. Those states recognize the far-reaching national and troublesome implications of the decision - a fact which calls for a fully considered decision on the merits by this Court even if it were to consider review of the case on the basis of certiorari rather than direct appeal.

Appellant contends that this is a proper appeal under 28 U.S.C. §1254(2) and even if treated as a petition for certiorari under 28 U.S.C. §2103, this case requires the Court's review.

I.

## ARGUMENT

At the outset, it is essential that a series of errors contained in the brief of the Solicitor General be corrected since the foundation upon which the Solicitor General has constructed its position rests on an apparent misunderstanding or mischaracterization of this case.

### A. CONSTITUTIONALITY WAS PRESENTED TO COURT OF APPEALS

First, the Solicitor General states "Neither did the briefs filed by the parties in the court of appeals contest or defend the constitutionality of §9." (S.G. Br.8) This simply is not true. Appellant's brief initially cited 23 O.S. §9 as the basis for punitive damages in the case, (Plaintiff-Appellee Br.2), extensively discussed the interpretation of the elements of the statute in Oklahoma cases (ibid. 67-73), and asserted that as a case involving State tort principles that preceded the adoption of the preemptive federal statute, the constitutional standard of Nader v. Allegheny Airlines, 426 U.S. 290 (1976) applied[1], rather than Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th CIR 1971), affd. mem. 405 U.S. 1035 (1972). (Plaintiff-Appellees Br. 45)

In the Supplemental Memorandum of Plaintiff-Appellee we further urged the adoption of the Nader

---

[1] Nader held that the preexisting right must be "so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy, in other words render it nugatory." 426 U.S. at 298.

Constitutional Standard. (Plaintiff-Appellee's Supp. Mem.3-6). Appellant squarely placed the Constitutionality of §9 before the court of appeals.

B. STATUTE WAS CONSIDERED BY COURT OF APPEALS

Second, the Solicitor General argues that since the majority opinion did not cite the statute in question, it must not have considered the constitutionality of the statute. This attempts to elevate poor craftsmanship to a determinant of the right to a direct appeal. In Oklahoma punitive damages are statutory, and statutory alone. The Appellee acknowledged this in its Brief below, (Defendants-Appellants' Br.60) as does the Solicitor General. (S.G. Br.10, n.15) There is no common law action for punitive damages in Oklahoma. Barnes v. McKinney, 589 P.2d 698,700n.1 (OK.App.1978), Gilbreath v. Phillips Petroleum Co., 526 F.Supp. 657,659 (W.D. OK.1980).

The Solicitor General cites Nixon v. Oklahoma City, 555 P.2d 1283 (OK.1976), which omits mention of 23 O.S. §9 but unmistakably interprets it. The Court recognized that the persons punished by an award of punitive damages against a municipality would be the taxpaying public rather than "the agents over which it is able to exercise but little control"; and it is the public to be benefitted by the imposition of punitives. Thus, the Court reasoned the direction of §9 that punitives are to be awarded when the transgressor "has been guilty of oppression, fraud or malice . . . by way of punishing the defendant" would therefore not be met with a municipal defendant - a consideration inapposite in this case.

The Solicitor General concedes that where the determination of unconstitutionality is a "necessary

predicate to relief" an appeal is proper even though the court below did not expressly hold a statute unconstitutional. (S.G. Br.8,n.11) This is exactly such a case - where the only source is statutory, the preemption of punitive damages under the Supremacy Clause unavoidably required a holding that the state statute as applied is repugnant to the United States Constitution or laws within the meaning of 28 U.S.C. §1254(2).

C. "FINESSING" (1254(2))

Third, while the brief of the Solicitor General correctly observes that a §1254(2) appeal provides for a mandatory review where a state statute is invalid, but not where a common law right is abrogated, it expresses doubt that a "state may finesse the [statutory vs. common law] distinction by making a statutory declaration of common law." (Br.10,n.15) Since the Oklahoma punitive statute was adopted in its present form by the First Territorial Legislature in 1890, St.1890 §2619, just how Oklahoma had "finessed" this distinction remains obscure. This Court recognized the pre-existing nature of state tort remedies in Duke Power v. Carolina Environmental Study Group 438 U.S. 59,88,n.33 (1978):

> "Appellees' only right prior to the enactment of the Price-Anderson Act was to utilize their existing common law and state law [i.e. statutory] remedies to vindicate any particular harm visited on them from whatever sources." (emphasis added)

Indeed, this pre-existing status mandates the application of Nader and produces the due process and equal protection dimensions of this case. Under

Nader, there should be a strong presumption against nullification of one existing state tort law, and no preemption absent an unmistakable Congressional intent to preempt. The inconsistency of the Circuit's analysis with the proper standards recognized by this Court in Nader demands review by this Court. Moreover, the pre-existing nature of punitive damages clearly distinguishes this case from Northern States which involved the adoption of a competing regulatory scheme long after the federal system was in place and the direct clash of highly technical standards, rather than the application of a long-standing general punitive damage statute in a private lawsuit.

D. AVOIDING THE CONSTITUTIONAL CONTROVERSY

Fourth, the Solicitor General asserts that the statute was not necessarily passed upon by the court of appeals since it might have interpreted the statute as not justifying punitive damages. This argument is transparently hollow. It ignores the deference which must be given to the jury's determination and the trial court's concurrence. The Circuit, in fact, did not overturn the punitive award on other non-preemption grounds. Moreover, the clear duty of the court of appeals was to avoid constitutional issues unnecessary to resolve the rights of the parties, especially where statutory or factual issues exist. Blum v. Bacon ___U.S.___, 102 S.Ct. 2355,2359 (1981), Gulf Oil Co. v. Bernard 452 U.S. 89 (1981). Appellee placed a number of statutory and factual issues - including those presented in Appellee's brief to this Court - before the court of appeals. The appeals court could have resolved any of these in Appellee's favor, but did not, as the Solicitor General recognizes:

> "None of those [non-federal] questions was addressed by the court of appeals, though it should surely have done so before holding that the state statute unconstitutionally invaded the province of federal law." (S.G. Br.10)

The Solicitor General's bench memo does not demonstrate the absence of a right to a direct appeal - it merely urges other unmeritorious grounds upon which this Court might uphold the Circuit. These arguments cannot undo the fact that given the well-entrenched rule that constitutional issues are to be decided only as a last resort, the Circuit necessarily determined that the other grounds asserted for reversal were unmeritorious. Beside, the Circuit did, as the Solicitor General has to acknowledge, "speak unmistakably of 'preemption of punitive damages by the Atomic Energy Act'" (S.G. Br.8,n.12).

The other arguments which the Solicitor General discusses at length are thus first, irrelevant because they were not what the Circuit did decide, and second, are in fact unmeritorious.

I

The Solicitor General opines that since the plaintiff's action for compensatory damages has been replaced by the worker's compensation law, the courts might conclude that punitive damages may not be covered. (S.G. Br.10) The Solicitor General obviously overlooks its own acknowledgment that the $5,000 personal property damage award was upheld by the court of appeals. (S.G. Br.5,n.5). In Oklahoma, a property damage cause of action will support punitive damages. State, ex rel. Pollution, etc. v. Kerr-McGee Corporation, 619 P.2d 858 (OK.1980), Garland Coal v.

Few, 267 F.2d 785 (10th CIR 1959). This property damage award would by itself support punitive damages in a substantial amount.[2]

II

Additionally, the question of Appellee's liability for the personal injuries suffered by Karen Silkwood is by no means finally resolved, as suggested in Appellant's Jurisdictional Statement at page 6, note 5.

Under Oklahoma law, an employee who is intentionally or willfully injured by his or her employer is entitled to sue for such injuries in a common law action as if the Workers' Compensation Law did not exist. Hull v. Wolfe, 393 P.2d 491,493 (OK.1964).

The trial court limited the introduction of evidence by Appellant which would go to establishing an intentional or willful contamination by Appellees because of the court's ruling that the case was not subject to the Workers' Compensation courts and because Appellant also had theories of negligence and

---

[2] Appellees' assertion that a 20-to-1 ratio between the actual damages and the punitive damages awarded by the jury was per se excessive was rejected in the trial court's opinion [see, Silkwood v. Kerr-McGee Corp., 485 F.Supp. 566,589-591 (1979)] and not reached by the Tenth Circuit. Appellant's ratio argument has been expressly rejected by the Oklahoma courts--see, Timmons v. Royal Globe Ins. Co., 53 OBAJ 1898 (OK. August 7, 1982)--upholding a punitive award 44 times an actual award. Thus, using Appellees' own peculiar legal calculus, a punitive damage award of at least $220,000 with actual damage of even $5,000 would not be per se excessive.

gross negligence. As one example, the court limited evidence as to anti-union attitudes by Appellees' plant manager. See tr. 7624. Appellant's trial strategies, evidence, jury arguments and requested instructions were all formulated and presented in reliance on the court's rulings. See, e.g., tr. 10,641.

If the jury's determinations are not sufficient by themselves tc establish an entitlement to recovery on a Hull v. Wolfe type of common law cause of action, Appellant may still be entitled to a new trial on the issue of an intentional or willful contamination. The trial court recognized that there was a common law right of action for an intentional contamination. See tr. 1068.

Thus, the issue of Appellant's entitlement to punitive damages is by no means moot. There is an actual damage award as well as a jury determination that Appellant had the degree ot culpability necessary for a large punitive damage award, and the trial court concurred when it refused to set aside or alter the jury's verdict. See, 485 F.Supp. at 591.

III

The Solicitor General also speculates that Oklahoma courts might decide that the Appellee's compliance with federal regulations negates as a matter of state law the state of mind required by §9. (S.G. Br.10). As we amply demonstrated in our brief below, the Appellee was not in compliance with applicable federal regulations. Plaintiff-Appellee's Br.98-102, Plaintiff-Appellee's Supp. Mem. 12,n.19. The presence of clear and convincing proof in the trial record of such non-compliance amply explains why the court of appeals did not reverse the punitive award in this

case on that ground rather than reaching the constitutional issue.

Moreover, Oklahoma law has never acknowledged the "compliance" defense asserted by Appellees. As to negligence, Oklahoma follows the almost universal rule that compliance with statutory or administrative requirements does not preclude a finding of negligence, but is merely evidence of use of due care. Transport Indemnity Company v. Page, 406 P.2d 980 (OK.1965); McBroom v. Mayer, 303 P.2d 303 (OK.1956); Kansas O&G Ry. Co. v. Clark, 262 P.426 (OK.1903). Where the common law standard of due care greatly exceeds the administrative minimum, as here, Oklahoma law would not bar punitives where conscious indifference to the consequences of an act or reckless disregard of the rights of the injured was demonstrated. Thus, the court of appeals was fully justified in rejecting Appellees' factual and statutory defenses and moving to decide the constitutional question - which it undoubtedly did.

## E. NRC LICENSING

Fifth, defending the decision below, the Solicitor General emphasizes a purported strict control exercised by the Nuclear Regulatory Commission over the activities of licenses such as Appellee. Apparently, it is this comprehensive regulation of nuclear power that mandates the preemption of punitive damages, although the Solicitor General tenders no actual constitutional test comparable to the court of appeals "substantially competes"; rather, the brief of the Solicitor General mechanically applies Northern States in a manner utilized in an "occupation of the field" preemption analysis. This is not an occupation of the field case. The Circuit's upholding of

the property damage verdict demonstrated that the AEC Act has not occupied the field of tort recovery. And, as the record in this case demonstrated, the comprehensive and strict regulating of Appellees' plutonium fuel fabrication facility was largely illusory. As NRC Regional Director James Keppler testified:

> ". . our experience is that it is not equating compliance to safety - it is not a 100% guarantee, if you will. Our experience is that licenses are deficient in certain areas. It is hard to foresee all the conditions that may exist that you might want a license condition to touch on." (App.1511)

Keppler also testified that small, but biologically significant, quantities of plutonium could escape from the plant and yet no license conditions be violated since they were directed at the removal of strategic amounts.[3]

Perhaps the most compelling example of a regulatory gap[4] was that despite the necessity for a thorough and systematic dismantling of Karen Silkwood's apartment by workers in protective clothing and respirators in a month-long operation and the confiscation and storage in large drums of virtually

---

[3] In other parts of his testimony, Keppler restated that compliance with the conditions of the license was no guarantee of safety (App.1527) and that the regulations reflected minimum standards. (App.1523)

[4] For another regulatory gap in Appellee's license see J.S. 8,n.13 and App. 1518.

all of her personal possessions, Appellee was not cited by the NRC for violation of any significant regulatory standards.[5]

F. DUE PROCESS AND EQUAL PROTECTION

Sixth, viewing the "only question regarding such [equal protection and due process] claims is whether Congress' decision to preclude punitive damages 'is demonstrably arbitrary and irrational'", the Solicitor General characterizes Appellant's constitutional arguments as frivolous. (S.G. Br.16). However, Duke Power compels an additional question: May Congress abolish a pre-existing statutory right of a state citizen to certain remedies to vindicate his interests without providing a reasonably just substitute? In Duke Power the Court invoked the waiver of defenses provisions of the Price-Anderson Act as providing a quid pro quo in exchange for the exceedingly remote possibility that damages could exceed the $560 million ceiling. In this case, not only was Appellant left to his own devices under State law for this sub-threshold nuclear incident, the NRC did not extend the financial protection and indemnifications for an extraordinary nuclear occurrence to the Appellees' plutonium processing and fabrication facility until

---

[5] The only regulatory standards related to the escape of biologically significant amounts of plutonium off-site is for maximum permissible air concentration (10 CFR §20.106(a)(1974)) and for external radiation (10 CFR §20.105(b)) in an "unrestricted area". The air regulations allow the concentration to be averaged over a full-year so that the regulation obviously is not designed to cover a one-time off-site contamination. External radiation regulations have scant application since plutonium, as an alpha emitter, imposes a threat from inhalation and ingestion, not external radiation.

after the events giving rise to plaintiff's cause of action (S.G. Br.15,n.18). Thus, those protections relied upon in Duke Power are wholly absent in this case.

The Solicitor General makes light of Appellant's entitlement to punitives by emphasizing that they are a windfall to the suing party and are designed for protection of the society as a whole. The Societally-protective feature is undeniable, yet the law gives a suing party an entitlement to a jury's consideration of punitives and to the jury's award if the statutory requisites are met. The statutory requirements were met here and there was an ample evidentiary basis for the award - a fact which even the Circuit did not dispute. Under Oklahoma law, it is error for a court to deny punitive damages to a party which has met the statutory requirements. Thus, Appellant has been deprived of damages which he had a statutory right to. And, if this right can be nullified by an appellate court on general public policy grounds, Appellant has been denied the verdict properly rendered by a conscientious jury after a long trial - in effect a nullification of Appellant's right to a jury trial. Substantial constitutional issues were raised by the decision below - issues which must be resolved by the Court in this case.

## II.

## WHY THE COURT SHOULD ACCEPT THIS CASE FOR REVIEW

The Solicitor General urges the Court to decline to review the decision of the court of appeals in this case on the basis that, on one hand, the court of appeals decision is correct, and, on the other, if the court of appeals erred, the Court should await "a more mature consideration by other courts of appeal." (S.G. Br.11)

The issue before the Court at this stage is merely whether the Court should exercise its plenary power and allow Appellant to file a brief and argue the case. The excellent brief of the Amici States amply confirms the importance of this case and outlines the manifest error committed by the court of appeals. In the brief of the Solicitor General, the same flawed analysis displayed by the majority of the court of appeals panel is to be found.

## A. PUNITIVE DAMAGES ARE RECOVERABLE UNDER THE PRICE-ANDERSON ACT

Of particular note is the assertion by the Solicitor General that no punitive damages are recoverable under the Price-Anderson Act and hence, allowing them in sub-threshold cases would be inconsistent with the Atomic Energy Act and must be preempted. A short review of the development of the relevant statutes establishes that the Solicitor General is simply wrong.

When the Atomic Energy Act was adopted in 1954, it contained no reference to liability or indemnity. Over the next few years it was determined that uncertainty over the potential exposure to financial risk presented an impediment to the private sector development of atomic energy. AEC Staff Study of the Price-Anderson Act, Selected Materials on Atomic Energy Indemnity and Insurance Legislation, Joint Committee on Atomic Energy, p.2-3 (1965).

When the Price-Anderson Act was adopted in 1957, all questions of liability for nuclear incidents were to be determined according to state law.

S.Rep. No.296, 1957 U.S. Code, Cong. & Admin. News, 1803, 1810 (1957).[6]

In response to questions raised concerning the "responsibilities and regulatory powers of State and local governments", in 1959 Congress enacted Section 274 of the Atomic Energy Act. Selected Materials on Federal-State Cooperation in the Atomic Energy Field, Joint Committee on Atomic Energy, p.1 (1959). The text and legislative history of this amendment relate solely to attempts by the states to directly regulate by comprehensive safety standards enforced by an administrative agency those nuclear facilities already being regulated by the Atomic Energy Commission. ibid, pp.5,151-239. The 1959 Act did not purport to affect in any way the provisions of the 1957 Price-Anderson Act - which had left all questions of liability for acts by licensees to state tort law.

As the 10-year life of the Price-Anderson Act ebbed, commentators began to express concern that certain state tort principles might bar recovery in some states, while not in others. Professor David Cavers raised a number of such issues and proposed the adoption of a new federal tort statute which would resolve any uncertainties. (S.G. Br.15,n.19) As the Solicitor General states, Professor Cavers noted in his article that some states might impose punitive damages against a nuclear incident defendant and recommended that "to avoid this, recovery should be denied in all nuclear cases..." (emphasis added).

---

[6] For a full recitation of relevant legislative history of the Price-Anderson Act see Addendum A to Plaintiff-Appellees' Petition for Rehearing and Suggestion for Rehearing in Banc, J.S. App.(II), pp. 128a-132a.

This proposed federal nuclear tort statute was rejected by the Congress:

> "However, the committee does not believe it is necessary to go to the length of enacting substantive law - that is a new body of federal tort law - to achieve these ends...
>
> This [waiver of defenses] approach to the problems discussed above is in keeping with the approach followed in enacting the original Price-Anderson Act - namely, interfering with State law to the minimum extent necessary." S.Rep. 1605, 1966 U.S. Code, Cong. & Admin. News 3201, 3209 (1966).

One exploring the text and legislative history of the 1966 amendments to the Price-Anderson Act will never find a trace of Congress adopting Professor Cavers' other suggestion: that punitive damages should be denied in all nuclear cases.

### B. PUNITIVE DAMAGES ARE AVAILABLE IN SUB-THRESHOLD CASES

Even if punitive damages were not available under the Price-Anderson Act, Congress has specifically left sub-threshold cases like this one to state tort law.[7]

The 1966 amendments did not supplant the applicability of state tort law in any way to nuclear incidents not rising to the level of an extraordinary nuclear occurrence:

> "...at the same time, however, the bill has been drafted so that minor claims involving

---

[7] The Price-Anderson Act constitutes a "savings clause" within the meaning of Nader, 426 U.S. at 298.

> nuclear facilities or materials may remain subject to the traditional rules . . .
>
> Accordingly, in the absence of some extraordinary occurrence involving a nuclear facility or device or nuclear materials, traditional concepts should be allowed to prevail." S.Rep.1605, 1966 U.S. Code, Cong. & Admin. News 3201,3211 (1966).

When the Price-Anderson Act was extended to 1975 it was again recognized that state tort law applies to sub-threshold incidents. Duke Power Co., Supra, at 89.[8]

Clearly, punitive damages are available under the Price-Anderson Act and the awarding of punitive damages in a sub-threshold case cannot "compete" with the federal regulatory scheme. Regardless, Congress has specifically authorized the application of state tort law to cases such as this without expressed limitation and through repeated legislative history negativing any such limitation. See J.S. App.I, at 21a-22a. As the dissenting opinion below observed:

> "The fact that Congress has expressly excepted the private tort action without

---

[8] The Columbia University Legislative Drafting Research Fund concluded that if the Price-Anderson Act was not extended, parties injured in an extraordinary nuclear occurrence "would be subject to whatever tort laws prevailed in the State in which the incident occurred or in which they suffered harm." H.Rep. 698, 94th Cong., 1st Sess, 7 (1975). Punitive damages are, obviously, part of state tort law - a fact Congress was aware of all along.

restriction argues against any implied intent to preempt a part of such action." (J.S. App. (I), 33a,n.1).

## WHY THE COURT SHOULD NOT DEFER CONSIDERATION OF THE ISSUES RAISED BY THIS CASE

Even if the court of appeals reached an improper result in this case, the brief of the Solicitor General nevertheless urges the Court to avoid deciding the issues raised by this case and await a "more mature consideration by other courts of appeal." (S.G. Br.11). Apparently, the Solicitor General views the effect of this decision on the states of the Tenth Circuit as inconsequential.[9] Of course, no mention is made of the effect of a denial of certiorari on the parties - the small matter of $10,000,000.00. But, what of the vital interests of the states in the Tenth Circuit?

The Tenth Circuit contains the very heart of the nuclear industry - the nuclear fuel cycle[10] is present throughout these states: 85% of the nation's

---

[9] All six states of the circuit provide for the recovery of punitive damages. Colorado: C.R.S.'73, 13-21-102; New Mexico: Wirth v. Commercial Resources, Inc., 630 P.2d 292,298 (N.M. App.1981); Kansas: Lindquist v. Ayerst Laboratories, Inc., 607 P.2d 1339, 1347 (KAN 1980); Wyoming: W.S.A. 1977 §12-5-502 and Sears v. Summit, Inc., 616 P.2d 765,772 (WY 1980); Utah: Elkington v. Foust, 618 P.2d 37,41 (Utah 1980).

[10] The fuel cycle consists of mining, milling, conversion, fuel fabrication, fuel use, reprocessing and waste storage. Loftness, Energy Handbook, Van Nostrand, New York, 1978, p.260.

total uranium reserves, U.S. Department of Energy, Statistical Data of the Uranium Industry, 1979[11]; identifiable thorium reserves, Cuff & Young, The United States Energy Atlas, Free Press, New York 1980 (hereafter, Energy Atlas), p.184, as well as lithium, Energy Atlas, p.188; 16 of the 17 active uranium mills in the United States, Energy Handbook, p.260 which produce tons of radio-active waste called "tailings" - sands and slime residues which remain after extraction from the bulk of the ore, Energy Handbook, p.274; the Fort St. Vrain nuclear power plant is located near Weld, Colorado, and the Wolfe Creek nuclear power plant is nearing completion outside Coffeyville, Kansas. U.S. Dept. of Energy, Inventory of Power Plants in the United States, 1980 Annual pp.49,102; and, finally, rock salt deposits suitable for the proposed disposal of high level radioactive waste, Energy Handbook, p.277.

Of particular importance, two of the world's largest nuclear facilities are found within the circuit: the Los Alamos Scientific Laboratory is a major nuclear research center located near Santa Fe, New Mexico, situated between Denver and Boulder, the Rocky Flats Plant manufactures the plutonium triggers for the nation's nuclear arsenal and was the site of one of the most expensive industrial accidents in history.

Based on the above, it is hard to imagine an area of our country where the effect of the decision of the court of appeals could be more pernicious - where the citizens of states would be more directly affected by the abrogation of their long-standing

---

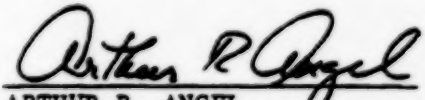
[11] See also United Nuclear Corp. v. General Atomic Co., 629 P.2d 231,271 (N.M.1981).

rights. This Court should decline the invitation of the Solicitor General to await a decision from another court.

## CONCLUSION

It is doubtful that the Court will be presented with a more complete record upon which to decide these momentous issues no matter how long the Court waits for another court to face reckless misconduct by a nuclear defendant. Most certainly, these issues should not be decided without the benefit of the full briefs of the appellant and the Amici States and the oral argument of counsel. Now is the time to decide this issue and this is the case.

Respectfully submitted,



ARTHUR R. ANGEL
Counsel of Record*
301 First Life Bldg.
Oklahoma City, OK 73102
(405) 232-2070

JAMES A. IKARD
4420 N. Lincoln Blvd.
Oklahoma City, OK 73105
(405) 424-4358

GERALD L. SPENCE
SPENCE, MORIARITY & SCHUSTER
265 Pearl Street
Jackson, Wyoming 83001

DANIEL P. SHEEHAN
1324 North Capitol Street
Washington, D.C. 20002

*Counsel of Record

COUNSEL FOR APPELLANT